Supreme Court of the United States

OCTOBER TERM 1919.

NO. ~~615~~ 290

ANNA LANG as Administratrix of the Goods, Chattels and Credits of OSCAR G. LANG, Deceased,

Petitioner,

vs.

NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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CASES CITED.

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Petitioner,

vs.

NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

BRIEF IN OPPOSITION TO THE APPLICATION.

STATEMENT OF FACTS.

The facts in this case, which are undisputed, are to the effect:

That plaintiff's intestate's train, a way freight (Fol. 66) was eastbound, having started from Erie and being destined for Buffalo (Fols. 64-5); arrived at Silver Creek at 11.25 a. m. on the 1st day of November, 1917 (Fol. 173). The train came in and stopped on track No. 1 (Fol. 126).

At Silver Creek they were to take on a car which was destined for Farnham, the next station east (Fol. 129). This car for Farnham, A. L. E. & W.

12085 (Fol. 116) was on what is known as the house-track at Silver Creek, and next east was the defective car known as "A. & W. P. car 2936" (Fol. 115). The westerly end of the latter car was defective in that the drawbar was out, which included the coupling and knuckle, (Fols. 80-1). This car was in good condition when it reached Silver Creek some time before, but in shifting it around the yard the drawbar had been pulled out (Fols. 106-7).

This defective car was loaded with iron consigned to the Huntley Manufacturing Company at Silver Creek (Fol. 120), had been moved at least on two occasions previous to the accident, and after it was in this defective condition, by plaintiff's intestate and his crew (Fols. 173-4, 184). The Huntley Manufacturing Company had been unable to complete the unloading of the car, and some time before the accident it had been placed on the house-track for the purpose of unloading it into the freighthouse (Fols. 122-3).

The New York Central car which was destined for Farnham stood just west of this defective car, but was not connected with it in any way, and at the time in question it was not intended that this crew should have anything to do with the defective car, nor was it necessary for them to come in contact with it in any way (Fols. 190-1).

The conductor talked the matter over with members of his crew, including plaintiff's intestate, and they determined that on account of this defective car they could not reach the Farnham car

from the easterly end of the switch; so they determined that the proper way to get the Farnham car was to enter the houseswitch from the westerly end (Fols. 174-6).

After this conversation between them, the engine went in on the westerly end of the house-track, plaintiff's intestate being on the engine and in control of it. They pulled out the string of six cars (including the car for Farnham), which were just west of the crippled car (Fol. 136). Lang and Chessel the two brakemen, shunted the Farnham car out onto the passing siding, so that it could be placed in the train (Fol. 137). They placed two of the other cars they had hauled out on the grape track, which is the track south of the station and is used for the loading of grapes in the grape season (Fol. 136). Then they kicked the other three cars they had hauled out back onto the house-track (Fols. 129-130, 139), and the plaintiff's intestate rode in on these three cars. The leading or most westerly car was New York Central refrigerator car No. 152485 (Fols. 118-119), and the brake on this car was on the easterly end of it.

It was only intended to place them so they would clear side track (Fols. 143-4, 178). There was plenty of room for this, as they were placing three cars in the space which had just been occupied by six.

The last seen of plaintiff's intestate previous to the accident was by the conductor, who said he saw him mounting these three cars when they

were five or six car lengths from the defective car (Fol. 146); the next time he was noticed was when the engine was moving easterly over the passing siding, and when they were at a point opposite to New York Central car No. 152485 they saw the intestate clinging to the brake, with one of his legs hanging down and blood running from it (Fols. 155, 164-5). The complaint alleges (Fol. 17) that, while attempting to apply the brakes on the car, plaintiff's intestate's right foot slipped off the end of the car and that while in the act of pulling himself up his leg was caught between the running boards of the two cars.

An examination showed that the running-board of the New York Central car on which plaintiff's intestate was riding was freshly splintered about eight or ten feet back from the end. The middle running-board had been recently loosened and lifted up and there was a fresh nick in the running-board of the crippled car. It was also shown from the measurements of the car that the defective car was lower in height than the refrigerator car. On account of the lack of draw-head and couplers these two cars came together, and the running-board of the crippled car may have passed under the running-board of the refrigerator car and caught intestate's leg at a point where he would be standing when he was setting the brake (Fols. 223-5, 233). These cars stood about two or three feet apart after the accident (Fol. 155).

The handbrake on this freight car was in good condition (Fols. 226, 230).

Plaintiff's intestate knew that the crippled car was there, knew that it was defective and what the defect was, it having been previously discussed by him and his crew. He knew its exact location, as he went in there and took the other cars out. The movements were under his control. He did not need to have the cars kicked in. The engine was also under his control as to the speed at which the cars were shunted in, and he could have put them in there at a fast or slow rate, as the conditions warranted. He having moved this crippled car before on two occasions, knew of its condition, and could see at a glance that the drawbars and couplers being out there was nothing to prevent the two cars coming in contact with each other, unless kept under control. It was broad daylight, and there was absolutely no reason for his not seeing and knowing what the situation was right up to the time of the accident.

There was plenty of room on the house-track to place the cars that he was putting in so that they would not come in contact with the end of this defective car, the fact being that he had taken out six cars that were standing on this house-track west of this defective car; that out of the six, one car was to go to Farnham, and the other two were put in on the grape track to be loaded; so that he had only three cars to put back in the space where formerly six had stood. There was therefore absolutely no excuse for his placing the car upon which he was riding up against the defective car. The other two cars he was riding down also had brakes on them, and if there was any danger of these cars colliding with the defective car, the intestate could have mounted one of

the other two cars. Or if he did not want to do any of these things he could have had the engine shunt them in at such a slow rate that there would be no trouble about stopping before they reached the defective car; or he could have had the engine push them in slowly and hold on to them until the engine itself had stopped them at a point before they reached the defective car.

The movements were under the signal control of plaintiff's intestate. He knew the situation. He knew the car was defective. He had talked with the conductor just before they started the movement and knew that the reason they had to go in on the west end instead of on the east end was due to the fact that the westerly end of the car was defective.

There was no need and it was not the intention to couple onto or move the defective car or to come in contact with it.

The conductor testifies (Fol. 191):

"Q. Was it the intention of your crew to couple onto this defective car?

A. No, sir.

Q. Was it the intention to move or change this defective car in any way?

A. No, sir."

At (Fol. 143) he testified:

"Q. Was that your practice to put it up against the other car?

Mr. Spratt: I object to that as leading and suggestive.

Q. Is that correct?

A. No, sir, to leave it in to clear the side track, the three cars."

And at (Fol. 144):

"Q. What did he have to do up there?
A. Set the brake to stop them when they got into clear.
Q. By getting into clear you mean?
A. The side track."

Really the better place for him to have been was on the last car so that he could have observed when these three cars cleared the side track.

Judge Wheeler in his opinion (Fol. 279) states:

"It evidently was not the intention of any of the crew to disturb, couple onto or move the crippled car."

Andrews, J., writing the opinion of the Court of Appeals said:

"There was no attempt to couple onto the defective car or to handle it in any way."

ARGUMENT.

The Trial Court and the Court of Appeals have both distinctly held that there was no intention to or attempt to couple onto the defective car or to handle it in any way. This fact has been finally and conclusively established against the plaintiff, and as we understand the rule this finding of fact will be adopted by this court.

The record discloses, and it is in fact conceded on page 11 of petitioner's brief, that the condition of this car was well known to the crew, including intestate, and that because of its condition they were purposely avoiding coupling to it or in any way moving it.

The record also discloses, and it is in fact conceded on page 13 of petitioner's brief, that the

collision occurred because intestate did not stop the cars, as he intended to do, before they came in collision with the defective car.

Manifestly the proximate cause of the injury was the failure of intestate to stop the cars. The trial judge was of the opinion (record, page 97) that the absence of the coupler was the proximate cause of the injury. The Court of Appeals clearly was right in holding that the collision was not the proximate result of the absence of the coupler and drawbar, and the reversal of the judgment and dismissal of the complaint was not error. We will present further argument in our answers to the various points mentioned in petitioner's brief.

POINT I.

Under Point I of petitioner's brief precisely the same reasons are given why this court should grant the application, as were presented to the Court of Appeals to sustain the decision of the lower state courts. There is but one contention that merits a reply, namely, the assertion that this court by its decisions in the Layton case (243 U. S. 617) and the Gotschall case (244 U. S. 66) has overruled the Conarty case (238 U. S. 243). It is a matter of common knowledge that the decisions of any court depend upon the facts established in each case. The Court of Appeals of this state sees no conflict between the decision in the Conarty case and the decisions in the Layton and Gotschall cases. We believe that if this court had intended to overrule the Conarty case, it would frankly have so stated and given its reasons for so doing.

In neither the Layton or Gotschall cases do we find any expression of this court, which in the slightest sustains the claim of the petitioner.

Mr. Justice Andrews, in writing the opinion for the Court of Appeals, succinctly and correctly, we believe, states the distinction between the Conarty case and the Layton and Gotschall cases. This opinion, to which we refer the court, is a complete answer to petitioner's contention, but because of the attitude of the petitioner we are constrained to briefly review these cases.

In the Conarty case an employe of a railroad not endeavoring or intending to couple a car having defective couplers, or to handle it in any way, was riding on the footboard of an engine, which collided with it, and was killed in the collision. Had the coupler and drawbar been in place the engine and body of the car would have been kept sufficiently apart to have prevented the injury, but in their absence the engine came in immediate contact with the sill of the car with the result stated. The car was about to be placed on an isolated track for repairs and had been left near the switch leading to that track while various cars were being moved out of the way—a task taking about five minutes. This court said, page 249:

> "The principal question in the case is whether at the time he was injured the deceased was within the class of persons for whose benefit the Safety Appliance Acts required that the car be equipped with automatic couplers and drawbars of standard height; or, putting it in another way, whether his injury was within the evil against which the provisions for such appliances are directed. It is not claimed, nor could it be un-

> der the evidence, that the collision was proximately attributable to a violation of those provisions, but only that had they been complied with it would not have resulted in injury to the deceased."

and at pages 250-251:

> "It is very plain that the evils against which these provisions are directed are those which attended the old fashioned link and pin couplings where it was necessary for men to go between the ends of the cars to couple and uncouple them, and where the cars when coupled into a train sometimes separated by reason of the insecurity of the coupling. In Johnson v. Southern Pacific Co., 196 U. S. 1, 19, this court said of the provision for automatic couplers that 'The risk in coupling and uncoupling was the evil sought to be remedied'; and in Southern Ry. v. Crockett, 234 U. S. 725, 737, it was said to be the plain purpose of the two provisions that 'where one vehicle is used in connection with another, that portion of the equipment of each that has to do with the safety and security of the attachment between them shall conform to standard.' *Nothing in either provision gives any warrant for saying that they are intended to provide a place of safety between colliding cars.* On the contrary, they affirmatively show that a principal purpose in their enactment was to obviate 'the necessity for men going between the ends of the cars. 27 Stat. 531.'
>
> We are of the opinion that the deceased, who was not endeavoring to couple or uncouple the car or to handle it in any way but was riding on the colliding engine, was not in a situation where the absence of the prescribed coupler and drawbar operated as a breach of a duty imposed for his benefit, and that the Supreme Court of the State erred in concluding that the Safety Appliance Acts required it to hold otherwise." (Italics ours).

The facts in the *Conarty* case are almost, if not precisely the same as the facts in the Lang case, except, if anything, this case is more favorable to the defendant. There, as here, the intestate was engaged in interstate commerce. In both cases there was no intention to couple on to the car or handle it in any way. Conarty was riding on the footboard of the colliding engine. Lang was riding on the cars which collided with the defective car. In the *Conarty* case the defective car was, in about five minutes time, to be placed on an isolated track for repairs, but while awaiting that movement had been left near the switch leading to that track in order that other cars might be moved out of the way. Here the defective car was standing on a house track awaiting unloading, and there was no purpose or intention of disturbing it at all. In the *Conarty* case the accident happened at night, and the intestate knew nothing of the condition of the car or its location. Here the intestate knew all about the location of the car, its defective condition and it was his purpose to stop the cars upon which he was riding before they came in contact with the defective car. There, as here, the presence of the coupler and drawbar might have kept the cars apart and possibly the injury would not have resulted. In both cases the collision was the proximate cause of the injury.

Unless this court has, by its recent decisions, disapproved the *Conarty* case, that decision must be applied to the case at bar, in fact there is greater reason for applying those principles here than there was in the text case.

We have no quarrel with the decisions in the *Layton* and *Gotschall* cases, but we do dispute the claim of the petitioner that they are controlling here, in that they overrule the Conarty case.

In the *Layton* case the plaintiff was a switchman and was engaged under the following circumstances:

> "A train of many cars standing on a switch was separated by about two car lengths from five cars on the same track loaded with coal. An engine, pushing a stock car ahead of it, came into the switch, and failed in an attempt to couple to the five cars but struck them with such force, that although the engine with the car attached stopped within half a car length, the five loaded cars were driven over the two intervening car lengths and struck so violently against the standing train that the plaintiff, who was on one of the five cars for the purpose of releasing brakes, was thrown to the track." (pages 618-619).

There it was a defective coupler which prevented the engine from coupling to the five cars and brought about the accident. It was intended to couple onto these five cars on which plaintiff stood, and it was the very act of coupling and the defective coupler which brought about the accident.

In the *Gotschall* case the train upon which Gotschall was riding separated because of the opening of a coupler on one of the cars, resulting in an automatic setting of the emergency brake, which threw Gotschall off the train and under the wheels.

Certainly the Safety Appliance Act was applicable in the *Gotschall* case under the rule laid down

by this court in the *Conarty* case, where the court held that one of the evils against which the provisions were directed was:

> "Where the cars when coupled into a train sometimes separate by reason of the insecurity of the coupling."

There is not the slightest evidence in this case from which it can be claimed that the collision was proximately attributable to a violation of the Safety Appliance Acts. Here, as in the Conarty case, the most that can be urged is, that, had the acts been complied with, the injury to intestate would have been avoided. The defective coupler here did not contribute any more to the injury to intestate than did the defective coupler involved in the *Conarty* case. For this reason the authorities cited by petitioner, as bearing out the contention that if the defective coupler contributed in whole or in part to the injury, that is sufficient to establish liability under the Safety Appliance Act, are inapplicable. In fact, in all of the cases cited, the violation of the Act was the proximate cause of the injury.

In the *Huxell* case, 245 U. S., 538, there was a defective condition of the power brake. With proper brakes the engine could have been stopped within 40 feet. It ran more than 135 feet. The question was whether the deceased, who survived the accident for fifteen hours did not receive injuries which contributed to his death, during the time the engine was negligently run for 100 feet at least.

In the *Wagner* case, 241 U. S., 476, a brakeman, em[illegible]ed in interstate commerce, was endeavor-

ing to make a coupling between an engine and car. The coupling did not make on the first impact. On the next attempt he noticed that the drawhead on the engine was out of position and put his left foot in to shift it over so that the coupling would make. His right foot slipped on the footboard and his left foot was caught between the drawheads and crushed.

In the *Parker* case, 242 U. S., 56, there was no dispute but that the case was governed by the Safety Appliance Act. Parker was engaged in coupling a tender to a car. The coupling did not make the first time and Parker, noticing the drawheads were not in line, put in his arm to straighten them and was caught.

In the *Otos* case, 239 U. S., 349, the coupler was out of order, *the pin-lifter was missing*, and other repairs were needed. The car had been marked for repairs and was being switched to the repair track. Plaintiff being unable to uncouple the disabled car from the side where the pin-lifter was missing without going between the cars, did so while the cars were moving and was hurt.

In the *Rigsby* case, 241 U. S., 33, plaintiff fell owing to a defect in one of the handholds or grabirons that form the rungs of a ladder while he was descending the ladder.

In the *Delk* case, 220 U. S., 580, a loaded car being used in moving interstate commerce was found with a defective coupler. The car was marked "In bad order" and a repair piece sent

for. The car was not withdrawn from service, but the company kept moving it about in connection with other cars, and finally ordered the plaintiff to couple it to another car. The chain connecting the uncoupling lever to the lock-pin or lock-block, was disconnected, owing to a break in the lock-pin or lock-block. The drawbar had also a lateral motion of four inches. Plaintiff undertook to hold the drawbar away with his foot, from the side upon which he stood, so that the two couplers would couple by impact. In doing so his foot was injured.

In the *Lindsay* case, 233 U. S., 42, the couplings failed several times to couple automatically. Plaintiff went betwen the cars for the purpose of ascertaining and remedying if possible the cause of the trouble. Before doing so he signaled the engineer to stand fast. While he was between the cars, and engaged in handling the couplers the cars were pushed together and his arm was crushed.

In the *Spokane, etc.* case, 217 Fed., 524, the Safety Appliance Act was not involved.

In the *Schleenbacker* case, 257 Fed., 667, the company was hauling a car without drawbar or coupler, contrary to the express provisions of the act. This necessitated attaching it to the rear of the caboose, as a result of which the lights from the rear of the caboose had to be removed to the rear end of the defective car. The whole situation was created solely because of the use of the defective car.

We submit that there is no conflict between the law as expounded by this court and by the Court of Appeals of the State of New York. That there is no confusion as to the interpretation of the *Conarty, Layton* and *Cotschall* cases. The precise question here presented has been clearly decided by this court adversely to the petitioner's contention, and no question of public interest or of general importance is involved herein which has not already been given full consideration by this court. We again reiterate that had this court intended to overrule the Conarty case it would have specifically so stated. It is not the purpose or intention of this court to leave litigants in doubt as to the application of its decisions, and this claim, so strenuously urged by the petitioner, has absolutely no merit when the decisions are read in the light of the facts established in each case.

POINT II.

The Court of Appeals did not err in dismissing the complaint. In any event the question is not one which this court will review.

A.

At the close of plaintiff's case the defendant's counsel moved for a nonsuit (Fols. 207-208). The plaintiff's counsel at that time clearly indicated that he was standing squarely on the violation of the Safety Appliance Act (Fols. 209-212).

At the close of the defendant's case the defendant's counsel moved for a direction of a verdict (Fols. 240-241).

The Trial Court then held that absolute liability had been established under the Safety Appliance Act, and that he would submit to the jury simply the question of damages (Fols. 242-244). Plaintiff's counsel took no exception to the ruling of the court. He did not ask that the court submit to the jury any question under the Federal Employers' Liability Act, nor did he request the court to submit to the jury any question as to whether the alleged violation of the Safety Appliance Act was the proximate cause of the injury to the plaintiff.

An examination of the record will disclose to the court that the only proof illicited by the plaintiff, as establishing his cause of action, pertains to the violation of the Safety Appliance Act. Throughout the trial, and at the time the verdict for the plaintiff was directed, the plaintiff elected to submit her cause on but one ground of negligence, namely, a violation of the Safety Appliance Act. By trying the case upon this theory and by consenting to a directed verdict based solely upon a violation of the Safety Appliance Act, the plaintiff expressly waived her rights to go to the jury on any other question, and is now estopped from claiming that the Court of Appeals should have granted a new trial in order to permit her to prove her case under the Federal Employers' Liability Act. She is also estopped from claiming that the Court of Appeals should have granted a new trial in order that the question of proximate cause be submitted to the jury.

Second National Bank vs. Weston, 161 N. Y., 520.

Ormes vs. Dauchy, *et al.*, 82 N. Y. 443.
Parker-Smith vs. Prince Mfg. Co., 172 App. Div. (N. Y.) 302.

Furthermore, this contention has to do entirely with state practice and procedure, which this court will decline to review. The action of the Court of Appeals in dismissing the complaint, rather than granting a new trial, was purely procedural, and within the power of the court under Section 1337 of the Code of Civil Procedure of this state, which provides in part as follows:

> "In any action on an appeal to the Court of Appeals, the court may either modify or affirm the judgment or order appealed from, award a new trial, or grant to either party such judgment as such party may be entitled to."

Pangburn vs. Buick Motor Co., 211 N. Y., 228, 236.
Schoenherr vs. Van Meter, 215 N. Y., 548, 553.

The case was tried upon its merits and the Court of Appeals has held that upon the facts found the defendant is entitled to judgment dismissing the complaint. Under these circumstances this court will decline to review this question.

Baughm vs. N. Y. Phila. & Norfolk R. R., 241 U. S. 237.
Great Northern Ry. vs. Knapp, 240 U. S., 464.
Chicago Junction Ry. vs. King, 222 U. S., 222.

Point II of petitioner's brief obviously is based on the pretended claim that the plaintiff was de-

nied some federal right by the State Court. No such question is involved in the case. Neither upon the trial of the action, nor upon presentment of this appeal in the Appellate Division or in the Court of Appeals have these questions been raised. They have, therefore, not been passed upon by the State Court. Plaintiff contented herself with the submission of this cause solely upon a violation of the Safety Appliance Act. Under such circumstances it is academic that she cannot now claim the denial to her by the State Courts of any federal right.

Mutual Life Ins. Co. vs. McGrew, 188 U. S. 291.

Louisville & Nashville R. R. vs. Woodford, 234 U. S., 46.

B.

The claim that the question as to whether or not the violation of the Safety Appliance Act was the proximate cause of the injury was one for the jury and that, therefore, the Court of Appeals should have granted a new trial is without merit for other reasons than those assigned under subdivision A of this point.

There is nothing in the Federal Employers' Liability Act or in the Safety Appliance Acts that makes the question of proximate cause absolutely one for the jury. Under the decisions of this court the question of proximate cause may become one of law when the facts are clearly shown, and but one inference is to be drawn therefrom.

Choctaw O. & G. R. Co. vs. Holloway, 191 U. S., 334.

Roberts' "Federal Liability of Carriers," Vol. 2, p. 1327.
New York Central R. R. Co. vs. Kimball, 248 U. S. 572.

In the Kimball case the Trial Court directed a verdict for the plaintiff. The defendant made timely request to go to the jury on the question as to whether the defective car was the proximate cause of the accident. The motion was denied and an exception taken. This question was raised on appeal in all State Courts, and the judgment was affirmed. Petition for writ of certiorari was presented to this court and this precise question fully presented. The writ was denied.

POINT III.

The writ should be denied for the reason that the judgment of the Court of Appeals was subject to reconsideration by that court.

Section 237 of the Judicial Code provides only for review by this court of a cause "wherein a "final judgment or decree has been rendered or "passed by the highest court of the state in which "a decision could be had."

Rule 20 of the rules of the Court of Appeals of the State of New York provides as follows:

"RULE XX. Motions for Reargument.

Motions for reargument must be submitted on printed briefs (eighteen copies) without oral argument, on five days' notice of the adverse party, stating briefly the ground upon which a reargument is asked, and the points supposed to have been overlooked or misap-

prehended by the court, with proper reference to the particular portion of the case and to the authorities relied upon. A copy of the brief shall be served on the adverse party with the notice of motion."

Under the rule above quoted the Court of Appeals had discretion to grant a reargument of this cause and the jurisdiction and right to render a different decision if convinced that it had committed error in the respects claimed by the petitioner. No application to the Court of Appeals for reargument of this cause has been made. For this reason the writ should be denied.

Andrews v. Virginia Railway Co., 248 U. S., 272.

Chicago, G. W. R. R. Co. v. Basham, 249 U. S., 164.

POINT IV.

The application for the writ should be denied.

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